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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY, APPELLANT,

vs.

THE CITY OF CLEVELAND ET AL.

MOTION OF APPELLANT FOR INJUNCTION.

WILLIAM B. SANDERS,
ANDREW SQUIRE,
JOHN W. WARRINGTON,
Counsel for Appellant.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 23641

(20,083.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY, APPELLANT,

vs.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY, APPELLEES.

MOTION OF APPELLANT.

The Cleveland Electric Railway Company, appellant, respectfully moves the court for an order of injunction directed to the appellees, The City of Cleveland and The Forest City Railway Company, enjoining the said appellees and each of them, their agents, servants, attorneys, and representatives, from in any manner interfering with the appellant in the use of its street railroad tracks and property involved in this action upon Central avenue, Quincy street, and Erie street, in the city of Cleveland, pending the determination of the appeal in this court.

Appellant shows that, pending this appeal, which was promptly filed after the disposition of the case in the circuit court, it has continued the operation of the lines involved in dispute without interference by the city of Cleveland, but

that within the past few days, to wit, on the 26th day of October, 1906, the City of Cleveland forcibly, and by the use of the police force of the city, excluded the appellant from the operation of so much of its line of street railroad involved in this action as is between Prospect street and Central avenue upon Erie street; and the chief executive of said city gives out by public statement that it is the intention of the city, unless it is enjoined, to proceed to tear up the tracks of the appellant, both upon said Erie street and upon the remainder of the Central Avenue system involved in this action, which comprises about twelve miles of track, an integral part of the entire street railroad system operated by appellant, and thereby making it impossible, pending this appeal, for the appellant to operate such property, and seriously crippling the appellant in the operation of its system of 236 miles of railway in the city of Cleveland in accordance with the terms and conditions which have heretofore, in various ordinances of the city of Cleveland, been prescribed by the city council and appearing in the record herein; and to permit this destruction of the appellant's property involved in this action, pending this appeal, would render ineffectual the judgment of this court in the event that such judgment should be favorable to the contention of the appellant.

Appellant further shows that in the printed record herein the following facts appear:

I.

Appellant was complainant below, and from its amended bill of complaint (Record, 107) it appears that the purpose of its bill was to have declared void an ordinance of the city of Cleveland granting to The Forest City Railway Company the right to oust the appellant from the exercise of the right which it claimed from the city of Cleveland to operate a street railway line upon the streets in the bill described.

The cause having been heard upon the bill, answer, replication, and the testimony appearing in the record, the circuit court adjudged that the right of the appellant to operate its railway in said streets (Record, 276) expired on the 22d day of March, 1905, and refused the relief prayed for in the bill.

Appellant assigns, *inter alia*, as error this judgment of the court, and claims that its rights do not expire prior to July, 1914.

II.

From the record it appears that the appellant is a consolidated railway company formed by the consolidation of The East Cleveland Railroad Company, The Broadway and Newburgh Street Railroad Company, The South Side Street Railroad Company, and The Brooklyn Street Railroad Company; and is also the owner by purchase of all the tracks and franchises of The Cleveland City Railway Company, and that it is operating, as an entire system, about 236 miles of track. Of this 236 miles that which was originally operated by The East Cleveland Railroad Company as its Garden Street (now Central Avenue) extension was about 12 miles; that by virtue of various ordinances, constituting contract obligations of the appellant with the city growing out of said consolidation, the appellant is required to operate said entire system, run through cars, give transfers from one line to another; which obligations the appellant alleges are continuing obligations running to the year 1914.

III.

The controversy involved in this appeal relates to what was originally an extension built by The East Cleveland Railroad Company and known as the Garden Street branch of its main line. The original grant to The East Cleveland Railroad Company was for the operation of a line described

generally as beginning at the easterly limits of the city (then Willson avenue), thence, via Euclid avenue, Case avenue, Prospect street, Erie street, and Euclid avenue, to and around the Public square, and through Superior street to Water street; and this line, as originally constructed, constituted the "main line" of The East Cleveland Company, and its original grant from the city of Cleveland was for twenty years from September 20 1859.

The original grant for the Garden Street or Central Avenue line was made in January, 1868, as shown by the map in the record, page 302. This map discloses the main line and the relation of this branch or extension to such main line. This Garden Street branch was to be constructed and operated in connection with the main line of The East Cleveland Railroad Company. (See Record, 188.)

IV.

In March, 1868, the village of East Cleveland, a municipality adjoining the city of Cleveland on the east, granted to the East Cleveland Railroad Company the right to extend this Garden Street track or branch through the village of East Cleveland; and in March, 1873, the council granted to The East Cleveland Company the right to lay a double-track street railroad from its main line at the intersection of Erie and Prospect streets, through Erie street to Ohio street; through Ohio street to Garden street, connecting with its Garden Street extension at that point as the same had originally been constructed. The provisions of this grant were complied with by the company, and the Garden Street line became an extension intersecting the main line at Prospect and Erie streets, running thence through Erie to Ohio street; thence through Ohio to Garden street; through Garden to Baden street; and through Baden to Quincy street; and the company was required to operate this in connection with its main line, and run its cars through Erie street to Euclid

action upon Erie street has been and is now being used by the appellant as part of a loop line, and over such portion of Erie street there are operated, in addition to Central Avenue cars, cars from various other lines of the appellant, namely, Kinsman, Fairfield, Scovill avenue, Woodland avenue, and Jennings avenue; that the threatened action of the city in depriving the appellant of the use of such tracks upon Erie street will cripple its entire system and make it impracticable to so operate it as to bring to Monument square the cars of its various other lines above referred to, because to do so in any manner which did not involve the use of the Erie Street tracks would create a condition of congestion of traffic in Monument square to such an extent as to make street car operation during the busy hours of the day, night and morning, practically impossible.

Affiant further says that the following named companies, to wit, The Cleveland, Painesville and Eastern Railroad Company, The Eastern Ohio Traction Company, The Cleveland and South-western Traction Company, The Northern Ohio Traction and Light Company, and The Lake Shore Electric Railway Company, are operating lines of electric railway extending from Cleveland in different directions and accommodating the public in the various villages and cities within a radius of twenty-five or thirty miles from the city of Cleveland; that each of these companies, in addition to carrying passengers to and from surrounding towns and villages, is engaged in the business of handling package freight and express matter, and that, under and by virtue of the statutes of Ohio authorizing such an arrangement, for many years last past there has been and now is an arrangement between said last-mentioned companies and the appellant by which said companies and each of them, for the purpose of handling their freight and express matter in and out of the city of Cleveland, make use of the tracks of the appellant upon Erie street involved in this action, and that, in reliance upon such arrangement, there has been erected, adjoining Erie street

and accessible only over said tracks, a freight-house which is used by each and all of said suburban and interurban companies for the reception and delivery of freight and express matter carried by them in and out of the city of Cleveland; that to deprive the appellant of the use of said tracks, as threatened by the city of Cleveland and as said city is now doing, would not only irreparably damage the appellant, as hereinbefore set forth, but would irreparably injure the said interurban companies and each of them and hundreds of patrons of said companies who rely upon the service rendered by them in the matter of getting light freight and express matter in and out of the city of Cleveland; that no one of said companies has any other provision made in the city of Cleveland for the handling of such freight and express business, being absolutely dependent upon the use which the appellant is affording them of said tracks upon Erie street.

Affiant further says that the City of Cleveland claims no authority for interfering with the use or operation of appellant's tracks except the authority of the decree of the circuit court with respect to which this appeal is pending, and that, notwithstanding the pendency of this appeal, and which, as affiant is advised, will probably be reached for determination in this court at an early day, the said City of Cleveland is proceeding in the manner hereinbefore set forth, and threatens, as hereinbefore stated, to destroy the property of the appellant involved in this action; and that, in addition to the aforesaid action and threatened action of the City of Cleveland, affiant further says that the city has proceeded to further carry into effect the decree of the circuit court, pending said appeal, by undertaking to grant to the appellee, The Forest City Railway Company, by an ordinance, in addition to the ordinance set up in the bill of complaint herein, the right to construct and operate a line of railway on and over said Central Avenue route; but affiant says that said company has done nothing by way of construction

under such grant and is not in a position at present to undertake any such operation, as it has no construction upon any portion of such line and no equipment for its operation; and the ordinances by which it has been attempted to grant such right are void and of no effect, provided the contention of the appellant in this appeal is sustained by the final decree of this court.

Affiant further says that, by reason of what the city has already done, as above set forth, and the threats to proceed, as hereinbefore stated, he believes and alleges the fact to be that if notice of this application were given, the city would proceed before the matter could be heard in this court and destroy the appellant's property as hereinbefore set forth it is threatening to do.

Further affiant saith not.

JOHN J. STANLEY.

Sworn to before me by the said John J. Stanley and by him subscribed in my presence this 27th day of October, 1906.

[SEAL.] CHARLES C. OWENS.
A Notary Public Within and for the County of Cuyahoga, in the State of Ohio.

[Endorsed:] Supreme Court of the United States, October Term, 1905. No. 581. The Cleveland Electric Railway Company, appellant, *vs.* The City of Cleveland and The Forest City Railway Company, appellees. Affidavit of John J. Stanley.

avenue, through Euclid avenue to and around the Public square, and thence to Water street. (See Record, 200.)

V.

In May, 1876, The East Cleveland Railroad Company was authorized by the counsel to extend its Garden Street tracks from their then terminus at Baden street to Quincy street, and along Quincy to New street; and it was required to operate such extension in connection with the main line for the period of twenty years from May 23, 1876 (Record, 202).

VI.

On September 15, 1879, a general renewal of franchises was granted to The East Cleveland Railroad Company for the period of 25 years from and after September 20, 1879. This ordinance, however (see Record, 204), did not in terms include the Garden Street extension.

VII.

On March 22, 1880, an ordinance was passed (Record, 208) granting permission to the East Cleveland Railroad Company to extend its Garden Street tracks from the intersection of Baden and Quincy streets to the intersection with Lincoln avenue, and to equip and operate such extension and all the Garden Street tracks for the period of 25 years.

VIII.

On July 13, 1888 (Record, 219), an ordinance was passed granting to The East Cleveland Railroad Company the right to construct and operate its Euclid Avenue and Cedar Avenue lines by electricity (this including the "main line"), and this grant was to continue for the period of 25 years, not expiring, therefore, prior to July 13, 1913.

IX.

In February, 1885, the council authorized The East Cleveland Railroad Company to extend its Garden Street tracks in an easterly direction, and provided that the grant therein made should terminate "with the grant for the main line of The East Cleveland Railroad Company;" and subsequent to the time that the grant of the main line was extended to July 13, 1913, to wit, March 30, 1891, The East Cleveland Railroad Company was granted the right to construct a second or additional track upon Central avenue (Record and map, p. 227) from the east line of Willson avenue to the right of way of the Cleveland and Pittsburgh Railroad Company, and to connect said tracks so authorized with the tracks then in and upon Central avenue at Willson avenue; and in this ordinance it is provided that the right therein granted, which was to lay an additional track and operate in connection with the main line, should be valid "until the expiration of the grant for said company's main line."

X.

April 20, 1891 (Record, 228, 229), an ordinance was passed granting to the company the right to lay an additional or second track in Quincy street, and providing that the right therein granted "shall be valid until the expiration of the grant for said company's tracks in Quincy street east of Lincoln avenue, to wit, July 13, 1913."

XI.

February 19, 1894, an ordinance was passed (Record, 235; Map, p. 239) providing for the construction by The East Cleveland Company and The Cleveland City Railway Company of a cross-town line upon Willson avenue, and requir-

ing by the terms of said ordinance an express agreement on the part of The East Cleveland Company that it would build and construct such line and would so operate it that a passenger upon any car operated upon any part of Willson avenue, for one fare, should be entitled to be transferred to any other line of the appellant intersecting or coming to Willson avenue, and with the additional right and obligation to transfer from such second line to a car of any other line of the company operating the same which crosses the Cuyahoga river; and this line, with such obligation to transfer, is to be operated until July 1, 1914.

XII.

Prior to the consolidation which formed the appellant, the various constituent companies operated independent lines of street railroad. There was little, if any, interchange of traffic, and the public were required, with few unimportant exceptions, in patronizing said lines and desiring to take passage on another line, to pay an extra fare; and on May 29, 1893 (Record, 230, and maps at pp. 231-233), the council by resolution prescribed the terms and conditions upon which said various companies might be consolidated, and required that thereafter all of the lines should be operated as one system, and that but one fare should be charged for a continuous ride over any line of railroad, and requiring transfers to any other line, and requiring the company to accept in writing the terms of such resolution. Such acceptance was filed, and since such consolidation all of the lines have been operated as required by said resolution and as an entire system. Since 1903, when appellant acquired the lines of The Cleveland City Railway Company, it has been required to establish through lines and through car service, and by reason of these consolidations and purchases and the action of the council in fixing the terms and con-

ditions upon which the consolidation might be made operative, the tracks originally built upon Garden street as part of an extension of the main line of The East Cleveland Railroad Company had become part of its entire system of 236 miles over which through car service is given, and this so-called Garden Street line long since lost any identity as a separate and distinct line.

XIII.

The questions pending for decision upon this appeal, briefly stated, are these:

(*a*) It not being disputed that the franchise for the main line of The East Cleveland Company does not expire prior to July, 1913, do not these several extensions and consolidating ordinances evidence an intention and a contract by which the right to operate the so-called Garden Street extension or branch is to expire at the same time as the franchise for the main line?

(*b*) As, under the ordinance providing for the construction and operation of a cross-town line on Willson avenue, which is to be operated until 1914, the appellant was required to construct and operate in such manner as to give transfers to and from such line to all of its existing lines, is not such a contract, in legal effect, a recognition or a grant of the right to continue the operation of the lines crossing Willson avenue until July, 1914?

(*c*) As the counsel fixed the terms and conditions upon which the consolidation now forming the appellant could be made, and required the various lines to be operated as an entire system, did not such requirement necessarily involve a corresponding right upon the part of the appellant to

operate such entire system at least until the expiration of its franchise, expiring July 13, 1913?

WILLIAM B. SANDERS,
ANDREW SQUIRE,
JOHN W. WARRINGTON,
Of Counsel.

[Endorsed:] Supreme Court of the United States, October Term, 1905. No. 581. The Cleveland Electric Railway Company, appellant, *vs.* The City of Cleveland and The Forest City Railway Company. Motion of appellant.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY, *Appellant,*

vs.

THE CITY OF CLEVELAND and THE FOREST CITY RAILWAY COMPANY, *Appellees.*

Affidavit.

UNITED STATES OF AMERICA,
The State of Ohio, County of Cuyahoga, ss:

JOHN J. STANLEY, being first duly sworn according to law, says that he is the vice-president and general manager of The Cleveland Electric Railway Company, appellant herein; that on the 26th day of October, 1906, the City of Cleveland, through its police department, acting under orders of the mayor of said city, forcibly excluded the said The Cleveland Electric Railway Company from the use and operation of its

railway tracks upon Erie street between Prospect street and Central avenue, being a portion of the lines of railway involved in this action, and still excludes it from any use of such tracks, keeping the same under guard of policemen for that purpose; that the mayor of the city of Cleveland gives out in the public prints a threat and a statement of his intention to tear up the tracks of the appellant upon Erie street, and also gives out and threatens that he will also cause to be removed and torn up all of the tracks of the appellant upon the Central Avenue line, being the entire subject-matter involved in this litigation and comprising about twelve miles of track. Affiant says that this statement of the mayor has been given wide publicity in the public prints in Cleveland; and the mayor has also added and threatened that this he will do unless he is enjoined by some court from so doing; and affiant says that, unless restrained by the order of this court, the said City of Cleveland will proceed at once to tear up and remove the tracks and appliances of the appellant from all of the streets involved in this action.

Affiant says that said company is operating about 236 miles of track as an entire system, and has ever since the consolidation referred to in the record operated such system under the terms and conditions prescribed by the city council of the said city in the various ordinances referred to in the record herein.

Affiant says that the city of Cleveland, with respect to its street railway system, is so laid out as that it is necessary for all cars of the system in some way to reach Monument square, the center of the business portion of the city; that the space in such Monument square is so limited as that, in the practical operation of the lines, it is necessary to use loop lines in order to avoid a congestion of cars during the busy hours of the day, which would seriously inconvenience the public, both in the use of the cars and in the use of the highway; and because of these facts and under the orders and with the acquiescence of the city authorities, for many years last past the portion of the Central Avenue lines involved in this

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SUPREME COURT OF THE UNITED STATES.

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No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY, APPELLANT,

vs.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY, APPELLEES.

AFFIDAVIT OF HORACE E. ANDREWS.

UNITED STATES OF AMERICA, DISTRICT OF COLUMBIA, *ss:*

HORACE E. ANDREWS, being first duly sworn according to law, says that he is the president of appellant, The Cleveland Electric Railway Company, referred to in the affidavit of Tom L. Johnson, filed herein; that he has read said affidavit, and in reply thereto says:

It is true, as therein stated, that affiant had the negotiation with Mr. Johnson as mayor upon the subject-matter referred to in the letter of June 12th and this affiant's reply thereto under date of June 26th, set forth in the affidavit of said Johnson; but affiant says that it is not true, as stated in the affidavit of said Johnson, that The Cleveland Electric Railway Company, by affiant as its president, "refused to suggest such amendments in the proposed form, or

to propose any other form of agreement, and that as a result of said meeting the said Cleveland Electric Railway Company refused to enter into any such agreement, beyond an expression of a willingness on its part to have an accounting when the decision of this cause in this court should be made upon a basis then to be determined." On the contrary, affiant avers the fact to be that the affidavit of the said Johnson omits a most material part of the negotiations between him and this affiant; and affiant avers that under date of July 17th, 1905, he addressed to the said Johnson, as mayor, the following letter:

"JULY 17TH, 1905.

"Hon. TOM L. JOHNSON, *Mayor,*
"Cleveland, Ohio.

"DEAR SIR: In answer to your request for a written communication on the subject of the operation of cars in Central avenue and Quincy street, I submit herewith a form of contract between the company and the city, which I believe expresses fully the agreement we reached at our recent conference in your office, namely, that, if the Supreme Court of the United States, on final hearing of the lawsuit now pending in the circuit court, shall decide that the franchise rights of the company in Central avenue and Quincy street expired on the 22nd of last March, the company will pay to the city all that it shall receive from the operation of its cars in said portions of streets as are involved in excess of operating expenses, taxes, depreciation and six per cent. interest upon the value of the physical property used in the operation of the cars.

"Yours very truly,
"HORACE E. ANDREWS, *President.*"

That the following is the form of contract submitted with said letter, and which affiant then, as president, offered to make, viz:

"Whereas, the circuit court of the United States for the northern district of Ohio, eastern division, has held that the right of The Cleveland Electric Railway Company to operate in Central avenue and Quincy street expired on the 22nd day of March, 1905; and,

"Whereas, the city council of the city of Cleveland, on the 11th day of January, 1904, passed an ordinance entitled 'An ordinance granting to The Forest City Railway Company, its successors and assigns the renewal right to maintain and operate existing street-railroads in the following streets, to-wit: Commencing at the intersection of Prospect and Erie streets in the city of Cleveland, State of Ohio; thence southerly on, over and along Erie street to Central avenue; thence on over and along Central avenue to Lincoln avenue; also commencing at the intersection of Quincy street with Wilson avenue in said city; thence easterly on, over and along Quincy street to Woodland Hills avenue,' and the court of common pleas of Cuyahoga county, Ohio, has decided said ordinance to be illegal and void; and,

"Whereas, The Forest City Railway Company is perfecting an appeal to the circuit court for a review of said decision; and,

"Whereas, it would cause inconvenience to the public and to The Cleveland Electric Railway Company to suspend the operation of cars in said streets pending the determination of the matters now in litigation; and,

"Whereas, The Cleveland Electric Railway Company is willing, and desires, to continue the operation of its cars in said streets, but does not ask to take any advantage of said continued operation beyond the real date of the expiration of its franchise rights therein;

"Now, therefore, this memorandum of Agreement, made this — day of ——, 1905, by and between the City of Cleveland and The Cleveland Electric Railway Company, witnesses:

"That, for and in consideration of the City of Cleveland refraining from interfering with the continued operation of the cars of The Cleveland Electric Railway Company in Central avenue and Quincy street as said cars are now operated, The Cleveland Electric Railway Company agrees that it will furnish good and adequate street-railway service upon said streets at the rates of fare and transfer now charged by it, and, if the Supreme Court of the United States shall hold that its rights in said streets expired on the 22nd day of March, 1905, will pay to the city all of its earnings from the operation of cars in said Central avenue and Quincy street, less operating expenses, taxes, proper depreciation charges and six per cent. interest upon the

value of all physical property in any way used for or contributing to such service.

"In consideration of The Cleveland Electric Railway Company agreeing to furnish such service, and agreeing, in case of a decision by the Supreme Court of the United States adverse to its claims, to pay to the city such net earnings from the operation of its cars upon Quincy street and Central avenue, the City of Cleveland hereby agrees to and does permit The Cleveland Electric Railway Company to continue the operation of its cars in said streets, and to charge for transportation therein its present rates of fare, until the final decision of said case by the Supreme Court of the United States.

"The street-railway tracks of The Cleveland Electric Railway Company in Quincy street being a part of its Scovill-avenue and Pearl-street line, as now operated, and its tracks in Central avenue being a part of its Central-avenue line, as now operated, said company shall, and it hereby agrees that it will, immediately upon the signing of this agreement, report to the City of Cleveland its daily gross receipts upon said Scovill-Pearl and Central-avenue lines, separately, from the 22nd day of March, 1905, to the first day of July, 1905, and thereafter and until the final adjudication of said case of The Cleveland Electric Company against the City of Cleveland, now pending in the circuit court of the United States for the northern district of Ohio, eastern division, involving the right of the company to operate in Central avenue and Quincy street, make similar reports monthly, on or before the tenth day of each month, of the daily gross receipts of the preceding calendar month or part thereof.

"If said case shall be decided in favor of the city, The Cleveland Electric Railway Company shall, within thirty days after such decision, pay to the city, with interest at the rate of five per cent. per annum, compounded annually, the sum due the city under this agreement for the time from the 22nd day of March, 1905, to the date of such decision, the monthly sums, for the purpose of calculating interest, being deemed to be due on the 10th day of each month for the preceding month; and thereafter, until this agreement is replaced by some other agreement between the parties hereto, or until the Quincy-street and Central-avenue lines of street-railway cease to be operated by The Cleveland

Electric Railway Company, there shall be paid to the city, on or before the 20th day of each succeeding month, the amount due for the preceding month.

"Either party shall have the right, after the final decision of the Supreme Court of the United States, to terminate this agreement on thirty days' notice to the other.

"This agreement shall not prejudice the rights of the city or the company in said lawsuit pending in the said circuit court of the United States.

"Witness the signature of the City of Cleveland, by the mayor, thereunto duly authorized by resolution of the council, and the signature of The Cleveland Electric Railway Company, by its president, thereunto duly authorized by resolution of the board of directors of the company, affixed hereto on the — day of July, 1905."

This being the state of negotiation, the said Johnson, as mayor, refused to make the arrangement as proposed by this affiant, or to make any other arrangement than such as was expressed in the form of agreement prepared by the said mayor and appearing in his affidavit. That the arrangement so proposed by the mayor was such that neither in justice to the company nor to the city could affiant consent thereto; the proposal of the mayor making it necessary to determine in advance, by arbitrary estimates, a division as to gross and net receipts and operating expenses, taxes, and repairs, which, in the judgment of this affiant, it was impossible to fairly so fix in advance; and as shown in the agreement which affiant offered to make, the company then was and at all times has been willing to make an agreement with the city by which, in the event of an adverse ruling in this court, the profits, if any, derived from the operation of the Garden Street tracks might be determined by actual results of operation at the end of the period, and an accounting made to the city on the basis of actual and not upon that of estimated receipts.

Affiant further says that it is not true, as stated in the affidavit of the said Johnson, that his action in stopping the

operation of cars upon Erie street was not done in an oppressive and arbitrary manner, nor is it true that he gave any notice to the company of his intention so to do. No notice was given to the company of the intention of the city to take possession of its Erie Street tracks, and its first knowledge of the action of the city was the discovery by its employees that the police department of the city of Cleveland, during the business hours of the day, had taken possession of its tracks upon Erie street, and excluded all of the company's cars therefrom, and that such street was under a police guard for the purpose of continuing such exclusion.

Affiant further says that it is not true, as stated in the affidavit of said Johnson, that the lines operated by the railway company "could be conveniently operated without the use of the tracks in said portion of Erie street without inconvenience to the complainant or to the people of Cleveland, and without interrupting the operation of the cars of the complainant company even upon the streets and parts of streets as to which the circuit court of the United States * * * adjudged its rights to have expired." On the contrary, affiant avers the facts to be as stated in the affidavit of John J. Stanley, the general manager of the company, filed herein, and that the Erie Street tracks form a part of an important terminal loop used by the company in operating its general system coming to the public square, and that the necessary effect of depriving the railway company of the use of the tracks upon Erie street was to create a congestion of traffic in Ontario street and the public square during the busy hours of the day to such an extent as to seriously cripple the company in the operation of its many lines coming to the public square, causing serious delay in the handling of cars, so that passengers, instead of having the frequent service required by the ordinances, were compelled to wait during long intervals of time while the employees of the company were doing their utmost to straighten out the tangle and con-

gestion resulting from so being deprived of the Erie Street tracks; and this condition of crippled service and inconvenience to the public continued until the issuing of the restraining order in this court restoring, for the time being, to the railway company the use of its Erie Street tracks.

With respect to the averments of the affidavit of the said Johnson that the railway company is continuing to charge a cash fare of five cents, and selling tickets at eleven for fifty cents, whereas The Forest City Railway Company is willing to construct and operate a line in said streets with a rate of maximum fare of three cents, affiant says that in charging five cents and selling tickets at eleven for fifty cents it is exercising its contract rights with the city of Cleveland, as affirmed by this court in the case of The City *vs.* The Cleveland Electric Ry. Co., 194 U. S., and that by reason of the system of transfers made necessary by the consolidation and unification of system referred to in the bill herein, it results that the average fare received by the railway company at this time per passenger carried, including transfers, does not exceed three and forty-five one-hundredths cents, as the fact is that between thirty-five and forty per cent. of the passengers carried receive free transfers as the system is now operated.

Affiant further says that The Forest City Railway Company referred to in the affidavit of said Johnson as being willing to operate the Garden Street line at a three-cent fare, has not had at any time pending this appeal, and has not now, the equipment and generating capacity or the construction in said streets necessary for such operation; and affiant says that the said Forest City Company has never obtained a legal grant from the city of Cleveland for the operation of tracks in the portion of Erie street in controversy in this cause, having been unable to procure the consent of property-holders necessary to the validity of such a grant. That any and all grants which the said Forest City Company claim to

have received from the city of Cleveland with respect to operation of the Garden Street route are involved in litigation, the validity of such grants being attacked, among other grounds, upon the ground that they constitute contracts between the city and said Forest City Railway Company, and that said Tom L. Johnson, the mayor of the city, in contravention of public policy and of express statutes of Ohio, was at the time such grants were made and now is financially interested in said Forest City Company, and in testimony of the said Johnson which has been publicly taken in said litigation it has been by the said Johnson admitted that he has guaranteed against loss very many of the stock subscribers, aggregating many thousands of dollars, and as respects stock subscriptions amounting to some sixty thousand dollars he has not only guaranteed the subscribers against loss but has, jointly with another, agreed to take the stock off the hands of such subscribers with six per cent. interest at their option within two years, and that he has personally guaranteed substantially all of the obligations of said Forest City Railway Company incurred in the purchase of rails and equipment for its enterprise.

HORACE E. ANDREWS.

DISTRICT OF COLUMBIA, *ss:*

Subscribed and sworn to before me this the tenth day of November, 1906.

[SEAL.] JOHN A. WHELAN,
Notary Public.

(My commission expires Nov. 8, 1910.)

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CLERK.

SUPREME COURT OF THE UNITED STATES.

THE CLEVELAND [illegible] COMPANY,

THE CITY OF CLEVELAND AND THE FOREST CITY [illegible]

[illegible]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 197.

THE CLEVELAND ELECTRIC RAILWAY COMPANY,
APPELLANT,

vs.

THE CITY OF CLEVELAND AND THE FOREST CITY RAILWAY COMPANY, APPELLEES.

BRIEF ON MOTION FOR INJUNCTION.

Statement.

The appellant files herewith its motion for an order of injunction against the appellees and an affidavit in support of the motion. This is an emergency proceeding. It is necessary in order to prevent the destruction of the subject of the action pending here on appeal—twelve miles of street railway with the right to operate cars thereon—until final decree can be made by this court.

The main case is pending here on an appeal, having been brought from the equity side of the Federal circuit court sitting in Cleveland, Ohio. A brief statement of the facts and course of procedure of the case is presented in the motion aforesaid, commencing with paragraph I and extending to and including paragraph XII thereof.

The questions pending for decision upon the appeal are briefly stated in paragraph XIII of the motion.

We maintain that the present case must be ruled by the decisions of this court in Cleveland *vs.* Cleveland City Ry. Co., 194 U. S., 517, and Cleveland *vs.* Cleveland Electric Ry., 201 U. S., 529.

I.

COURT HAS POWER TO GRANT ORDER OF INJUNCTION.

Section 716, Compiled Statutes of 1901, vol. I, p. 580, provides:

"The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeably to the usages and principles of law."

In *Ex parte* Milwaukee R. Co., 5 Wall., 188, 1st Syl., it is said:

"A case being properly in this court by appeal, the court has a right to issue any writ which may be necessary to render its appellate jurisdiction effectual."

Accordingly, the court allowed a supersedeas of the judgment of the district court, although the district judge had refused to do so on the ground that the bond offered had been signed by a non-resident of the district. The appellant had petitioned this court for a mandamus to compel the district judge to approve the bond and allow a supersedeas. This court refused to interfere with his discretion, but itself allowed a supersedeas, basing its right to do so upon the fourteenth section of the judiciary act of 1789, now Section 716, *supra*.

In Hardeman *vs.* Anderson, 4 How., 640, plaintiff in error had sued out a writ of error and given bond, which of itself would have operated as a supersedeas, but by mistake he failed to perfect his proceeding, and the case was dismissed. The plaintiff in error having filed another writ of error later and given bond and made a motion in this court for a supersedeas, the motion was granted.

These cases were cited with approval in *In re* McKenzie, 180 U. S., 536, bot. 549, and p. 551.

It ought to follow from these decisions alone that a preliminary injunction may be granted until a hearing on the merits of the appeal, for otherwise the ruling on the appeal might be of no value.

In Leonard *vs.* Ozark Land Co., 115 U. S., 465, at p. 468, it was said:

"This court no doubt has power to modify an injunction granted by a decree below in advance of a final hearing of an appeal on its merits."

There can be no difference in principle between granting a temporary injunction pending appeal and modifying an injunction of the court below pending appeal.

In Murray *vs.* Over-toltz, 8th Fed., 110, McCrary, C. J., in refusing to interfere by injunction to prevent the execution of a judgment of a State court upon the ground that it had been superseded by an appeal therefrom to this court had occasion to speak of the remedy which we now seek. Referring to the power of this court, he said:

"That court is authorized to issue any writ which may be necessary for the exercise of its jurisdiction, and agreeable to the usages and principles of law. Rev. St., sec. 716. If the effect of the threatened proceedings would be to interfere with the exercise of the jurisdiction of the supreme court in the *quo warranto* case or to deprive the complainants of the full benefit of their writ of error and supersedeas bond, then the supreme court can enjoin them and a temporary injunction for that purpose can be granted by a judge of that court."

Jurisdiction analogous to that invoked here was exercised by the supreme court of Ohio, under Section 5573 of the Revised Statutes of that State, in Yeoman *vs.* Lasley, 36 O. S., 416. After that case had been taken to the supreme court of Ohio upon a proceeding in error, it was sought practically to deprive the plaintiff in error of the benefit of a reversal of the judgment it complained of; whereupon an injunction in the supreme court in the proceeding in error was sought and granted to hold the subject of the action *in statu quo* until the supreme court should dispose of the proceeding in error. Say the court in the last paragraph of the opinion, at p. 418:

"The making of such an allowance (that is, of injunction) is not the exercise of original, but of appellate jurisdiction, and is intended only for the protection of the rights of the parties in the suit or matter under review, on error."

It is not necessary to offer further citations. It seems to us plain that the temporary injunction here asked falls within the ordinary power of a court of equity to ~~show~~ allow and enforce any order which in its nature is ancillary to and necessary to render effectual its final decree in the case in which the order is sought. It is not conceivable that a court in the exercise of its equitable appellate power is without authority to hold the subject of an action pending before it in a fixed position until ultimate decision of the case is made.

II.

FORM OF ORDER.

Notice of this proceeding was not given to the other side because of the statement at the end of affidavit made by the vice-president and general manager of appellant, that if notice of this application were given, "the city would pro-

ceed before the matter could be heard in this court and destroy appellant's property as hereinbefore set forth." * * * We take it that the true method to avoid such action on the part of appellees and to avoid injury to either side, would be to allow an order compelling appellees to show cause at a specified time why the order of injunction asked should not be granted, and meanwhile to grant a temporary order restraining them until the matter can be disposed of by the court. In this way no harm could come to the appellees, no matter what should be the holding of the court upon the showing made by them. It would at most only be to permit a continuation of the operation of the cars as heretofore.

To deny this order would, in effect, be to allow appellees to carry into final execution *now* the very decree that is sought to be reversed on the appeal.

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